

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
DEAN ANTHONY CARTER,  
  
Defendant.

Case No. 2:17-cr-00153-HDM-GWF  
Case No. 2:20-cv-01059-HDM

ORDER

Defendant Dean Anthony Carter has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 141). The government has opposed (ECF No. 143), and Carter has replied (ECF No. 144).

On May 10, 2017, Carter was charged by way of indictment with one count of felon in possession of a firearm and one count of felon in possession of ammunition in violation of 18 U.S.C. § 922(g). (ECF No. 1). Pursuant to an agreement, Carter entered a plea of guilty to Count 2, which charged felon in possession of ammunition. (ECF Nos. 126 & 129). The court thereafter sentenced Carter to 63 months in prison. (ECF No. 27 & 28).

Section 922(g) prohibits the possession of ammunition by several categories of persons, including any person who has been convicted in any court of a crime punishable by a term of more than one year in prison. 18 U.S.C. § 922(g)(1). At the time of his conviction, Carter had several prior felonies, including three for which he received a cumulative 14-year sentence and a prior conviction for felon in possession of a firearm. When Carter was

1 charged and entered his plea in this case, the government was not  
2 required to prove that he knew he was a felon. *United States v.*  
3 *Enslin*, 327 F.3d 788, 798 (9th Cir. 2003). But shortly after Carter  
4 was sentenced, the U.S. Supreme Court concluded that a defendant  
5 may be convicted under § 922(g) only if the government proves that  
6 the defendant "knew he belonged to the relevant category of persons  
7 barred from possessing a firearm." *Rehaif v. United States*, 139 S.  
8 Ct. 2191, 2200 (2019). On the basis of *Rehaif* and the government's  
9 failure to charge his knowledge of status, Carter now moves to  
10 vacate his conviction.

11 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to  
12 vacate, set aside, or correct his sentence if: (1) the sentence  
13 was imposed in violation of the Constitution or laws of the United  
14 States; (2) the court was without jurisdiction to impose the  
15 sentence; (3) the sentence was in excess of the maximum authorized  
16 by law; or (4) the sentence is otherwise subject to collateral  
17 attack. *Id.* § 2255(a).

18 Carter argues that the omission of the *Rehaif* element from  
19 the indictment violated his Fifth Amendment rights guaranteeing  
20 that a grand jury find probable cause to support all the necessary  
21 elements of the crime and to not be tried on a fatally defective  
22 indictment and his Sixth Amendment rights to notice of the charges.  
23 He also alleges that the defective indictment deprived the court  
24 of jurisdiction. The government asserts that Carter has waived his  
25 right to bring these claims, that his claims are procedurally  
26 defaulted, and that the government is not required to prove the  
27 defendant knew his possession of firearms was unlawful.

28

1 As part of his plea, Carter "knowingly and expressly waive[d]  
2 all collateral challenges, including any claims under 28 U.S.C. §  
3 2255, to his conviction, sentence, and the procedure by which the  
4 Court adjudicated guilt and imposed sentence, except non-waivable  
5 claims of ineffective assistance of counsel." (ECF No. 126 at 9).  
6 Such "[a]n unconditional guilty plea waives all non-jurisdictional  
7 defenses and cures all antecedent constitutional defects, allowing  
8 only an attack on the voluntary and intelligent character of the  
9 plea." *United States v. Brizan*, 709 F.3d 864, 866-67 (9th Cir.  
10 2013); see also *Tollett v. Henderson*, 411 U.S. 258, 267 (1973);  
11 *United States v. Espinoza*, 816 Fed. App'x 82, 85 (9th Cir. June 1,  
12 2020) (unpublished disposition) (unconditional plea waiver  
13 precludes all Fifth and Sixth Amendment claims except to the extent  
14 they contest the court's jurisdiction or the voluntariness of the  
15 plea). Thus, except to the extent Carter attacks the jurisdiction  
16 of the court,<sup>1</sup> his claims are waived.<sup>2</sup>

17 Carter's jurisdictional argument is without merit. The  
18 omission of an element from the indictment does not affect the  
19 court's jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630  
20 (2002); *United States v. Ratigan*, 351 F.3d 957, 962-63 (9th Cir.  
21 2003); see also *United States v. Jackson*, 2020 WL 7624842, at \*1  
22 (9th Cir. Dec. 22, 2020) (unpublished disposition) (rejecting the  
23 defendant's argument that omission of the *Rehaif* element deprived  
24 the district court of jurisdiction); *United States v. Burleson*,

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25 <sup>1</sup> Carter does not attack the voluntariness of his plea.

26 <sup>2</sup> The court agrees with the well-reasoned opinions of several  
27 courts that none of the exceptions under *Tollett* to the collateral  
28 challenge waiver applies in this case. See, e.g., *United States v.*  
*Kelbch*, 2021 WL 96242, at \*2 (D. Nev. Jan. 7, 2021).

2020 WL 4218317, at \*1 (July 23, 2020) (unpublished disposition) (same); *Espinoza*, 2020 WL 2844542, at \*1 (same); *United States v. Moore*, 954 F.3d 1322, 1332 (11th Cir. 2020); *United States v. Hobbs*, 953 F.3d 853, 856 (6th Cir. 2020); *United States v. Balde*, 943 F.3d 73, 88-92 (2d Cir. 2019); *United States v. Burghardt*, 939 F.3d 397, 402 (1st Cir. 2019). *Cf. United States v. Singh*, 979 F.3d 697, 730 (9th Cir. 2020) (on direct appeal, reviewing omission of *Rehaif* element from indictment for plain error).

Moreover, Carter's Fifth and Sixth Amendment claims are procedurally defaulted, even assuming, as Carter argues, that they could be considered jurisdictional in nature.

"If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate" either "cause excusing his procedural default, and actual prejudice resulting from the claim of error," *United States v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is actually innocent of the offense, *Bousley v. United States*, 523 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires the petitioner to establish 'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation omitted).

1 Carter could have raised his claims on direct appeal but did  
2 not do so. They are therefore procedurally defaulted. It is  
3 unnecessary to resolve whether Carter can demonstrate cause for  
4 the default, because even if he could, he cannot demonstrate  
5 prejudice.<sup>3</sup>

6 Carter committed the instant offense after receiving a  
7 fourteen-year sentence for assault, assault with attempt to rape  
8 and attempted murder and additionally after having been previously  
9 convicted of felon in possession of a firearm. (PSR ¶¶ 35 & 37).  
10 Further, Carter acknowledged in his plea agreement that he had  
11 been previously convicted of a felony. (ECF No. 126 at 4). Finally,  
12 and most importantly, Carter acknowledged during his plea colloquy  
13 both that he had a prior felony conviction – specifically, a felon  
14 in possession of a firearm -- and that he was aware at the time of  
15 his offense that he was not allowed to possess a firearm. In light  
16 of Carter's admissions that he knew he was a convicted felon and  
17 that he was prohibited from possessing firearms, combined with his  
18 criminal history, the court is not persuaded that the outcome of  
19 the proceedings would have been any different had the grand jury  
20 been presented with, and the indictment had alleged, the *Rehaif*  
21 element.

22 Carter argues that he suffered prejudice because he was  
23 convicted by a court lacking jurisdiction. For the reasons  
24 previously discussed, this argument is without merit because the  
25 errors Carter complains of did not deprive the court of  
26 jurisdiction.

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28 <sup>3</sup> Carter does not argue actual innocence.

1 Carter alternatively argues that he is not required to  
2 demonstrate prejudice to obtain relief because the omission is  
3 structural error.

4 "[C]ertain errors, termed structural errors, might affect  
5 substantial rights regardless of their actual impact on an  
6 appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263  
7 (2010) (internal punctuation and citations omitted). Thus,  
8 structural error "warrant[s] habeas relief without a showing of  
9 specific prejudice." *United States v. Withers*, 638 F.3d 1055, 1063-  
10 64 (9th Cir. 2011). "But structural errors are a very limited class  
11 of errors that affect the framework within which the trial  
12 proceeds, such that it is often difficult to assess the effect of  
13 the error." *Marcus*, 560 U.S. at 263 (internal punctuation and  
14 citations omitted). Cases in which the Supreme Court has found  
15 structural error include total deprivation of counsel, lack of an  
16 impartial trial judge, violation of the right to a public trial  
17 and an erroneous reasonable-doubt instruction. See *id.* (discussing  
18 cases). In contrast, errors that have been found to be non-  
19 structural include where the court instructed on an invalid  
20 alternative theory of guilt, gave an instruction omitting an  
21 element of the offense, or erroneously instructed the jury on an  
22 element. *Id.* at 264 (discussing cases).

23 The Ninth Circuit has not yet addressed in a published opinion  
24 whether omission of the *Rehaif* element from the indictment is  
25 structural error. But it has held that the error is not structural  
26 in at least one unpublished decision. See *United States v. Jackson*,  
27 2020 WL 7624842, at \*1 n.1 (9th Cir. Dec. 22, 2020). And the First,  
28 Third, Fifth, Seventh, Eighth, and Tenth Circuits have concluded

1 that *Rehaif* errors are not structural. *United States v. Patrone*,  
 2 -- F.3d --, 2021 WL 128473, at \*3 (1st Cir. Jan. 14, 2021); *United*  
 3 *States v. Nasir*, 982 F.3d 144, 171 n.30 (3d Cir. Dec. 1, 2020);  
 4 *United States v. Lavalais*, 960 F.3d 180, 187 (5th Cir. 2020);  
 5 *United States v. Payne*, 964 F.3d 652, 657 (7th Cir. 2020); *United*  
 6 *United States v. Coleman*, 961 F.3d 1024, 1030 (8th Cir. 2020);  
 7 *States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020); see also  
 8 *United States v. Hill*, 2020 WL 7258551, at \*2 n.3 (3d Cir. Dec.  
 9 10, 2020) (unpublished disposition); *United States v. Watson*, 820  
 10 Fed. App'x 397, 400 (6th Cir. 2020) (unpublished disposition). But  
 11 see *United States v. Gary*, 954 F.3d 194, 206 (4th Cir. 2020). The  
 12 court agrees with the well-reasoned opinions of these courts and  
 13 concludes that a Rehaif error does not fall within the limited  
 14 class of errors the Supreme Court has found to be structural.<sup>4</sup>

15 Finally, Carter argues that *Rehaif* requires the government to  
 16 prove not only that he knew that he was a convicted felon but also  
 17 that he knew he was barred from possessing firearms.  
 18 Notwithstanding the fact that Carter admitted to the court that he  
 19 knew he was barred from possessing a firearm, Carter's legal  
 20 argument is also without merit. *United States v. Singh*, 979 F.3d

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21 <sup>4</sup> While there is some case law holding that defects in the  
 22 indictment are structural error, those cases apply only where the  
 23 claim is timely raised. See, e.g., *United States v. Du Bo*, 186  
 24 F.3d 1177, 1179 & 1180 n.3 (9th Cir. 1999) ("We hold that, if  
 25 properly challenged prior to trial, an indictment's complete  
 26 failure to recite an essential element of the charged offense is  
 27 not a minor or technical flaw subject to harmless error analysis,  
 28 but a fatal flaw requiring dismissal of the indictment. . . .  
 Untimely challenges to the sufficiency of an indictment are  
 reviewed under a more liberal standard."). Carter argues that he  
 raised his argument at the earliest possible opportunity and so  
 the timeliness limitation does not apply. The court does not agree.  
 As previously discussed, Carter could have challenged the  
 indictment on direct appeal but failed to do so. The claim is not  
 therefore timely raised.

1 697, 727 (9th Cir. 2020) ("[The defendant] contends that *Rehaif*  
2 requires the Government to prove he knew not only his status, but  
3 also that he knew his status prohibited him from owning a firearm.  
4 But this interpretation is not supported by *Rehaif* . . . .).

5 Accordingly, because the claims raised in Carter's § 2255  
6 motion are waived, procedurally defaulted and/or without merit, IT  
7 IS THEREFORE ORDERED that the motion to vacate, set aside or  
8 correct sentence (ECF No. 141) is hereby DENIED.

9 IT IS FURTHER ORDERED that Carter is DENIED a certificate of  
10 appealability, as jurists of reason would not find the court's  
11 denial of the motion to be debatable or wrong.

12 The Clerk of Court shall enter final judgment accordingly.

13 IT IS SO ORDERED.

14 DATED: This 8th day of February, 2021.

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17 UNITED STATES DISTRICT JUDGE